

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss

Department of Public Safety  
State Building Code Appeals Board

Daniel Lewis,	)	
Appellant,	)	
	)	
v.	)	DOCKET NO. 05-294
	)	
Town of Millbury and Ronald	)	
DeSantis,	)	
Appellees	)	

**BOARD'S RULING ON APPEAL**

**Procedural History**

This matter comes before the State Building Code Appeals Board ("the Board") on the Appellant's motion filed pursuant to 780 CMR 122.1. In accordance with 780 CMR 122.3, Appellant asks the Board to review Mr. Ronald DeSantis's, Inspector of Buildings for the Town of Millbury, failure to act when he refused to issue a certificate of occupancy for a residence located at 14 Cronin Brook Way, Millbury, Massachusetts; and for his failure to act by refusing to sign the building permit for the retaining wall. In accordance with MGL c. 30A, §§ 10 and 11; MGL c. 143, §100; 801 CMR 1.02 et. Seq.; and 780 CMR 122.3.4, the State Building Code Appeals Board convened a public hearing on September 7, 2006 where all interested parties were provided with an opportunity to testify and present evidence to the Board.

Present and presiding as the Board was Chairman Mr. Harry Smith, Mr. Jacob Nunnemacher, Mr. Brian Gale and Ms. Patricia Barry, acting as clerk. The Appellant, Daniel Lewis, an employee of Platinum Building & Design, appeared pro se. Present and testifying on behalf of the Appellant was Mr. Keith Knowles, Consulting Structural Engineer, and Mr. Robert McKie, President of Platinum Building & Design. Present and representing the Town of Millbury Department of Building & Inspections was Mr. Daniel

DeSantis. ("Inspector DeSantis"). The abutting property owner, Ms. Emily Crane, ("the Abutter"), was also present and provided testimony to the Board.

### **Exhibits<sup>1</sup>**

The following Exhibits were entered into evidence:

- Exhibit 1: Letter from State Building Inspector, William Robbins.
- Exhibit 2: Picture depicting four views of the abutter's property in relation to the retaining wall and water drainage on her property.

### **Findings of fact**

1. The Appellant, Daniel Lewis is an employee of Platinum Building & Design; the builders of the subject property and retaining wall located at 14 Cronin Brook Way, Millbury, Massachusetts. (Board records).
2. On or about August 17, 2005 the Appellant was granted a variance from the Millbury Zoning By-Laws to construct a retaining wall on the subject property. Subsequent to the approval of the variance for the retaining wall the Zoning Board ratified the design and placement of the retaining wall. (Board records and Testimony of Inspector DeSantis).
3. On or about August 19, 2005, the Appellant was issued a building permit to construct the retaining wall. The permit was issued by Mr. Glen Hand, the Inspector of Buildings for the Town of Millbury, at that time. The construction of the retaining wall began on August 19, 2005 and was completed on May 15, 2006. (Board records, Testimony at hearing of the Appellant and Mr. Desantis).
4. On or about December 5, 2005, Inspector DeSantis was hired as the Inspector of Buildings for the Town of Millbury Department of Building & Inspections. Although Mr. Hand remains with the Town of Millbury Department of Building & Inspections as a local building inspector, Inspector DeSantis is the only inspector with the authority to "sign off" on the retaining wall building permit. (Board records, Inspector DeSantis testimony at hearing).
5. Upon taking over the title of Inspector of Buildings, Mr. DeSantis began making intermediary inspections of the retaining wall which was essentially already constructed. During the intermediary inspections, Inspector DeSantis determined that the wall was not being constructed properly and notified the operator of his determination. (Board records, Appellant and Inspector DeSantis testimony at hearing).
6. Inspector DeSantis refused to issue a Certificate of Occupancy for the newly constructed house at 14 Cronin Brook Way because the retaining wall was not constructed in accordance with the zoning variance, the building permit, the construction documents on file with the Town of Millbury Building Department and the Massachusetts State Building Code. The zoning variance

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<sup>1</sup> The Board takes administrative notice of its own records. 801 CMR 1.01(10)(h)(administrative notice); M.G.L. 30A, §11(5).

granted by the Town of Millbury Zoning Board runs with the land; and the retaining wall was approved under said variance therefore if the wall does not meet the conditions of the variance, which overlaps with the use of the land that the house sits on, a Certificate of Occupancy will not be issued by Mr. DeSantis. (Board records, Testimony of Mr. DeSantis at hearing).

7. Inspector DeSantis has numerous concerns with the retaining wall which include the Appellant's failure to call for inspections for the wall; the wall was not built as designed; the material used to "chink" between the boulders of the wall should be three inch minus; but the Appellant used dirt to "chink" between the boulders; this type of material expands when wet causing the dirt to leave the boulders. Mr. DeSantis fears that if the water gets into the expansive material of the wall this winter and freezes there will be a partial or major failure of the wall. (Board records, Testimony of Mr. DeSantis at hearing).
8. Inspector DeSantis is also concerned with the fact that there is no evidence of compaction on either side of the wall as stated by the engineer, Mr. Keith Knowles in his May 15, 2006 report. The compaction report, prepared by American Engineering and Testing, only refers to the building pad area and does not state that the area in front of, directly behind and under the wall was compacted; the compaction test report makes no reference of the compaction of the wall. (Board records, Testimony of Mr. DeSantis at hearing).
9. The compaction testing and results were performed prior to Mr. DeSantis' arrival to the Department of Building and Inspections. (Board records, Testimony of Appellant at hearing).
10. The Appellant's did not create a swale to aid in the proper water drainage for the retaining wall; and as a result water rolls off the top of the wall and onto the abutting neighbor's property. (Board records, Exhibit 2, Abutter and Appellant's testimony at hearing)
11. Mr. Knowles is willing to stake his professional reputation on the safety of the wall since he believes that the retaining wall was built properly and is structurally sound. (Board records, Mr. Knowles testimony at hearing).
12. Mr. William Robbins, the State Building Inspector for District 5, which includes the Town of Millbury, concluded that after reviewing the data on the retaining wall, which included a compaction test and the October 5, 2005 compaction results; and speaking with Mr. Hand who was willing to sign the building permit after receiving said data from the Appellant; Mr. Robbins concluded that the Appellant "met the intent of the building code and regulation in the construction of the wall"; and that the wall should be approved during a final inspection and a Certificate of Occupancy should be issued. (Board records, Exhibit 2).

### Discussion

The issue at hand in this matter is the Appellant's claim that Inspector DeSantis failed to act when he refused to issue a Certificate of Occupancy for the

dwelling located at 14 Cronin Brook Way, Millbury, Massachusetts; and when he refused to sign the building permit for the retaining wall at said property. The Board respects and understands the stance taken by Inspector DeSantis as a result of his belief that the retaining wall, as built, is not structurally sound and presents a safety hazard. But, the Board also recognizes and acknowledges that, Mr. Keith Knowles, a structural engineer, has documented in a report and provided testimony to this Board, under oath, staking his license and professional credentials on the line; that the retaining wall is structurally sound and is adequate or more than adequate than designed.

Mr. DeSantis has reached the conclusion that there is nothing that the Appellant can do that will make him "feel better" about the retaining wall as it stands today; but for the Board to order that this wall be torn down when a structural engineer's report states that he was there during construction, that compaction was done and the retaining wall as built is adequate to hold the soil would be "over the top".

There is evidence that the retaining wall has a water drainage problem. As a result of water rolling off of the top of the retaining wall, the abutter of the subject property is experiencing the accumulation of water on her property. The Appellant should be able to provide better drainage at the top of the wall without having to tear down the wall. If the Appellant creates a swale so that the water does not run over the top of the wall and is diverted to a drainage facility or catch basin then the requirements of the Massachusetts State Building Code will be met regardless of whether the physical appearance of the wall is undesirable to others.

### **Conclusion**

Motion was made by Mr. Gale to order the issuance of the Certificate of Occupancy; based upon the structural engineer report which documents that the retaining wall is safe. The contractor must also install drainage at the top of the wall to prevent any water from running over the wall or coming through the wall; and to divert the water to a catch basin to move it away from the abutter's property.

Friendly amendments were made by Mr. Nunnemacher and Mr. Smith. Mr. Gale accepted the amendments and amended his motion to require that a third party structural engineer to do excavation testing behind the retaining wall to determine whether the two foot wide stone material is actually there and if so, that that material was placed behind

the wall as depicted in the plan. The structural engineer must design the drainage. The engineer must also be satisfied that the wall is structurally safe and that the drainage is going to divert the water to the catch basin. Once the third party engineer report is complete and any modifications or suggestions made by said engineer are completed; and the engineer signs off on the retaining wall and drainage; Mr. DeSantis is then ordered to sign off on the project and issue the Certificate of Occupancy.

**SO ORDERED,**

Harry Smith  
**HARRY SMITH**

Brian Gale  
**BRIAN GALE**

Jacob Nunnemacher  
**JACOB NUNNEMACHER**

DATED: October 12, 2006

In accordance with MGL, Chapter 30A, Section 14, any person aggrieved by this decision may appeal the decision to a court of competent jurisdiction within 30 days.